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IN THE

Supreme Court of the United States

October Term 1963
No. 72

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

Reference to Official Reports.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, is unreported. It appears at pages 109 to 117 of the certified record, and a copy is attached as Appendix A.

Constitutional and Statutory Provisions Involved in the Case.

The case involves the First and Fourteenth Amendments to the Constitution of the United States, Sections 311 and 311.2 of the California Penal Code, and portions of Title 17, Section 1 of the United States Code on registration of copyrights. The pertinent portions of the provisions are set forth as Appendix B.

Questions Presented for Review.

Whether a book, *if copyrighted*, is entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

Whether this Court is to abandon the rule expressed in *Roth v. United States* and *Alberts v. California* (54 U. S. 476), that obscenity is not within the area of constitutionally protected speech or press, in favor of a new rule giving absolute freedom of expression in the field of obscenity and pornography.

Whether, if that rule of *Roth-Alberts* is retained, the California statutes in question meet the other constitutional requirements set forth in such cases.

Whether, if the California statutes are valid, the book *Tropic of Cancer*, by Henry Miller, copywrited by Grove Press, Inc., may be held obscene under such statutes without violating the First and Fourteenth Amendments to the Constitution of the United States.

In an obscenity case, what weight this court will attach to the determination of the contemporary community moral standards as shown by the guilty verdict of a jury returned after the expiration of a very thorough twenty-seven days' trial.

Statement of the Case.

Petitioner was charged in a verified complaint, filed in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, with violation of Section 311.2 of the Penal Code of the State of California. [R. 2.] Such complaint alleged that petitioner, on October 9, 1961, did wilfully, unlawfully and knowingly exhibit and distribute . . . ob-

scene matter, to wit, the book *Tropic of Cancer* by Henry Miller. He was duly arraigned and entered a plea of not guilty. His jury trial commenced January 15, 1962. After twenty-seven trial days, on February 23, 1962, the jury returned a verdict of guilty.

In the course of such trial, petitioner's knowledge of the obscenity of the book (as required by *Eleazar Smith v. California*, 361 U. S. 147), was established by oral testimony and by People's Exhibit 1—a transcript of a tape recording of a conversation between petitioner and the arresting officer prior to the arrest.[1]

The book *Tropic of Cancer* was received in evidence and read to the jury. Thereafter, plaintiff produced and qualified as experts, eighteen witnesses who testified that in their opinion *Tropic of Cancer* was utterly without redeeming social importance and obscene as the term is defined in California Penal Code Section 311(a). They were:

LEON URIS. Author of *Exodus.*

DR. FRANK BAXTER. Lecturer and television personality. Professor Emeritus of English and American Literature.

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[1]People's Exhibit 1, a transcript of a tape recording of a conversation between petitioner and the arresting officer prior to arrest, admitted in evidence Rep. Tr. Vol. 1, p. 81, lines 9-11: (original page numbering)

Question [by arresting officer, at p. 1, lines 16-17]:
You say it [Tropic of Cancer] is obscene?
Answer (by petitioner): It's obscene.
Question [by arresting officer, at p. 4, lines 13-17]
I didn't see this [Tropic of Cancer] for sale down on the the street? That's why . . .
Answer (by petitioner): We don't sell it down there.
Question: How come?
Answer: It's obscene.

MRS. C. H. CULBERTSON. President of the State of California Congress of Parents and Teachers.

ARTHUR J. KATES. Owner of Sunset News Company, the largest distributor of periodicals in California.

RABBI ERNEST R. TRATTNER.

DR. MARCUS CRAHAN. Psychiatrist and Physician and Surgeon. Medical Director of the Correctional Facilities of Los Angeles County. A regular supporter of such libraries as Princeton, Syracuse, Claremont, Occidental and California at Berkeley.

DR. C. C. TRILLINGHAM. Los Angeles County Superintendent of Schools.

DR. RAYMOND LINDQUIST. Senior Minister of Hollywood First Presbyterian Church.

DR. HOWARD S. McDONALD. President of Los Angeles State College.

MRS. ELIZABETH LEWIS. Member of Board of Trustees, California Women's Prisons.

FATHER CLARENCE E. CROWTHER. Senior Episcopal Chaplain, University of California at Los Angeles.

DR. ELLIS A. JARVIS. Retired Superintendent of Schools, Los Angeles City School District.

MARIE LOUISE KEARNS. Author, lecturer, book reviewer, and teacher of creative writing.

DR. WARREN S. JONES. Chairman of the Department of Speech and Dramatic Arts, Pepperdine College, Los Angeles.

THOMAS A. DEVINE. Professor of Sociology, Pierce College, Los Angeles.

JOHN OTIS CARNEY. Professional writer.

MRS. EDITH STAFFORD. Past President, Los Angeles City Board of Education.

DR. JOSEPH PAUL DeRIVER. Psychiatrist and Physician and Surgeon. Author of the published books, *The Sexual Criminal and Crime*, and *The Sexual Psychopath.*

Exerpts from the testimony of these witnesses are set out in Appendix C.

The defense produced a number of witnesses in accordance with the ruling of *In re Harris*, 56 Cal. 2d 879, 366 P. 2d 305, who testified to a contrary opinion.

Following the guilty verdict, petitioner was granted probation on condition he serve the first thirty days of the probationary period in jail.

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment.

Summary of Argument.

In that the book *Tropic of Cancer* has been copyrighted, it is not entitled to the protection of the First Amendment. When an author or publisher avails himself of the right to copyright his works, he has converted such works into property. By so doing he has removed it from the public domain and prohibits others from exercising any freedom to utilize it. No one may validly claim *both* the constitutional guarantee of Free Speech and Press, and the exclusive right to do what such constitutional guarantee grants to all.

Even assuming that copyrighted material is within the area of free speech, the rules expressed by this

Court in *Roth-Alberts* and *Manual Enterprises v. Day* (370 U. S. 478) are adequate to suppress obscenity yet give full meaning to the First Amendment to the Constitution. They should not be abandoned to a concept of absolute freedom to express obscenity.

The California obscenity laws are constitutional, following closely the views expressed by this Court in *Roth-Alberts*. The definition of obscenity as material which ". . . to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest," does not dull the protection afforded by the First Amendment by use of the term "average person". The inclusion of such term is obviously but to forestall the determination of the character of material according to the views of extremists. The term "contemporary standards" was used in its most general sense and not limited to the community of Los Angeles, as the California law does not include the term "community".

In the trial of the action each side was given opportunity to establish the character of the material in question by use of expert witnesses. The opinions of such experts as were accepted by the jurors through the expression of their verdict are entitled to the most careful attention in this Court. Such opinions voiced under oath and tempered by relentless cross-examination clearly establish *Tropic of Cancer* to be obscene and utterly without redeeming social importance.

While appellate courts may of course indulge in independent judicial review of material adjudged obscene in the lower court, the verdict of a jury strengthed by extensive consideration of expert testimony should be given due respect by this Court.

ARGUMENT.

I.

The Constitutional Guarantee of Freedom of Speech and Press Does Not Protect Copyrighted Material.

The First Amendment to the United States Constitution prohibits Congress from making any law abridging the freedom of speech or of the press. This basic right of Free Speech, in its true concept, is equally available to all. Everyone may speak, print, publish or distribute whatever is within the constitutional realm of Free Speech. The right of Free Speech is not limited to original utterances. To so construe the right of Free Speech would largely destroy this right as few people ever utter original expressions.

One man's right of Free Speech is as great as that of the next. It extends to all.

The "publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices." (*Eleazar Smith v. California*, 361 U. S. 147.)

With these basic principles all must now agree.

Now let us consider one salient fact. *Tropic of Cancer*, the book here involved, was copyrighted in 1961 by Grove Press, Inc.

Title 17, Section 1 of the United States Code Annotated, reads in part:

Chapter 1 — Registration of Copyrights

> Sec. 1. Exclusive rights as to copyrighted works
> "(a) To print, reprint, publish, copy, and vend the copyrighted work;"

Obviously, the grant of an exclusive right "to print, reprint, publish, copy, and vend the copyrighted work," as expressly provided in the above section of the United States Code, abridges the right of others to enjoy the right of Free Speech and Press, which includes "publication and dissemination of books and other forms of the printed word . . .", which acts "furnish very familiar applications of these constitutionally protected freedoms." (*Eleazar Smith v. California, supra.*)

If there is any conflict between the copyright law, enacted pursuant to the provisions of Article I, Section 8, of the Constitution, and Freedom of Speech and Press, as guaranteed by the First Amendment to the Constitution, the provisions of the amendment supersede those of the original Constitution. (16 C. J. S. 99, Sec. 26, Constitutional Law.) Further, under the enlightened philosophy of this day, if any such conflict exists, human rights, as guaranteed by the First Amendment, must prevail over property rights provided for by Article I, Section 8.

Consequently, either all copyright law is invalid as an unconstitutional impingement on the rights of Free Speech and Press of those whose rights to publish and disseminate the copyrighted material are purportedly restricted by the copyright, or else any material that is copyrighted is thereby removed from the realm of Free Speech.

The conclusion that copyrighted material is removed from the realm of free speech is consistent with, in fact is compelled by, the constitutional provision authorizing Congress to enact a copyright law.

Article I, Section 8, of the United States Constitution, reads in part:

> "Section 8. The Congress shall have power . . . to promote the progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries."

Obviously, the framers of our Constitution did not intentionally create an inherent inconsistency within its terms by on the one hand providing for the creation of an exclusive property right in written material, and on the other hand protecting the right of all to exercise Free Speech and Press including, *on an equal basis to all*, the right to publish and disseminate books and other forms of the printed word.

As further evidence of the intent to provide for two separate and distinct rights, the one a property right and the other Free Speech, it is significant that it is only for "limited times" that such property right may be granted.

As has been well said,

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'." (*Mazer v. Stein*, 347 U. S. 201.)

From this it is clearly evident that, while willing to thus encourage the creation of literary efforts, the framers of our Constitution were unwilling that such works should permanently remain the property of the author or his assignee. Consequently, they provided for an exclusive property right, but further provided that this property right should be for "limited times."

This statutory right of copyright completely differs from the common law right of an author to his *unpublished* manuscript. It has long been recognized that under common law, as soon as the manuscript was published, it became common property. (*Little v. Hall*, 18 How. 165.) This, of course, is consistent with the right of Free Speech. But when pursuant to constitutional authority Congress grants to a copyright holder the "exclusive" right "to print, reprint, publish, copy, and vend the copyrighted work," which right continues *after* publication, then such right is totally inconsistent with Free Speech.

By providing for such a copyright law the Constitution itself has made it optionally possible for an author to remove his manuscript from the realm of Free Speech, and convert it into property. This has been done with *Tropic of Cancer*.

By removal of copyrighted material from the realm of Free Speech it becomes property, and the property rights thereby created are protected by the Fourteenth Amendment to the Constitution.

"Free Speech" is diametrically opposed to the optional property protection available under the copyright laws.

The Fifth Amendment, as construed by this Court, gives to a person the right to refuse to speak; the

First Amendment gives him the right to freely express his thoughts, opinions, and beliefs; the copyright law gives him the privilege—at his option—of reducing his expressions to property. Therefore, with respect to thoughts, opinions or beliefs, a person may keep them to himself by remaining silent; he may express them to the world by exercising his right of Free Speech; or he may create a vested property right by availing himself of the copyright law.

If a person avails himself of the privilege of copyrighting his expressions, then "Free Speech" is not and cannot be involved. Instead of exercising his right of Free Speech he has created property.

"Free Speech" is a personal right, it cannot be bartered away. In fact, there would be no purpose in attempting to do so, as the person who purports to acquire such right from another would have no greater right than that which he already possessed—his own right of "Free Speech." And, as a corollary, if that which is copyrighted is still subject to "Free Speech," then a copyright is a nullity, as the constitutional right of Free Speech would give to all the right to repeat and use, to publish and disseminate, the thoughts and expressions which had been copyrighted. But because a copyright changes the nature of what is expressed from that of "Free Speech" to property, it can be bartered away, it can restrict the right of others to publish and disseminate the copyrighted material.

In the instant case, that which had been written was copyrighted and the publisher now holds the copyright. The writing had therefore been changed from "Free Speech" to property. No one except by permission of the copyright owner may publish and disseminate such

book. The defendant bookseller had no right to disseminate *Tropic of Cancer*, except as permitted by the copyright owner, as the sole right to do so is a property right owned by the publisher. The author himself had no right to publish or disseminate *Tropic of Cancer;* he has assigned the right to the publisher. Only the publisher had a right to publish and disseminate that book!

Further, the owner of the copyright need not make available to the public what has been copyrighted. As this Court stated:

> "The owner of a copyright, if he pleases, may refrain from vending and licensing, and content himself with simply exercising the right to exclude others from using his property." (*Fox Film Corp. v. Doyal*, 286 U. S. 123.)

Is this then the exercise of "Free Speech"? Does "Free Speech" end with the first expression of a thought, opinion, or belief? This alone should demonstrate that "Free Speech" cannot properly be an issue where copyrighted material is involved.

As this Court further stated:

> "A copyright is the property of the individual owner, because it is a right exercised by the owner during a definite term of years exclusively for his own profit and forms the basis for extensive and profitable enterprises." (*Fox Films v. Doyal, supra.*)

Is this the right which so transcends all others in importance that rather than restrict it we would pollute the streams of commerce and poison the minds of the susceptible?

Another distinction between a copyrighted work and "Free Speech" is that by a copyright notice is given to the public that the owner of the copyright "has not abandoned his work or dedicated it to the public." Yet the very purpose of the right of "Free Speech" is to enable a person to give to the public—to share with the world—his thoughts, his opinions, his beliefs.

Still another difference is that the historic and traditional concept of "Free Speech," and the necessity for granting the right of "Free Speech," is to enable a person to express an unpopular thought, opinion or belief. A constitutional guaranty of Free Speech is not necessary to enable a person to express that which is popular! Yet a copyright is to protect the profits that can be made from a work that is popular.

The necessity for the right of "Free Speech" becomes increasingly greater as the thought, opinion, or belief becomes less popular; conversely, the value of a copyright increases with the popularity of the work copyrighted.

The constitutional protection of "Free Speech" is to assure the right to freely express thoughts, opinions and beliefs; it is not for the purpose of assuring profitable exploitation of what has been expressed. Conversely, a copyright is not for the purpose of expressing thoughts, opinions, or beliefs; it is for the purpose of changing to property what has been expressed so that it may be commercially exploited, and, if desired, to suppress its publication and dissemination. (*Fox Films Corp. v. Doyal, supra.*)

The election is at the option of the author. He may exercise the right of Free Speech, or he may obtain a

property right. He cannot avail himself of both rights. The two "rights" are in absolute contradiction; there exists an inescapable logical incompatibility."

None of the occasions for which the right of "Free Speech" was intended will in any way be adversely affected by properly construing copyrighted material as not included within the realm of Free Speech. Would the recognition of this distinction prevent or interfere with:

(a) Efforts to organize unions or political parties? (*Herndon v. Lowery*, 301 U. S. 242.)

(b) The distribution of handbills? (*Hague v. C. I. O.*, 307 U. S. 496; *Schneider v. Irvington*, 308 U. S. 147.)

(c) The right to picket or carry a banner? (*Carlson v. California*, 310 U. S. 106.)

(d) Making speeches or writing articles attacking or defending existing beliefs or office holders, or advocating political, social, religious or economic ideas, beliefs, changes or reforms? (*Murdock v. Pennsylvania*, 319 U. S. 105; *Taylor v. Mississippi*, 319 U. S. 583.)

Neither would the owner of a copyright be unprotected. He would have the full protection of the Fourteenth Amendment: he could not be deprived of such property, including the right to reasonably use his property gainfully, such as by sales of copies of the copyrighted works, except by due process. Therefore, unless reasonably required in the public interest, the right to sell copies of the copyrighted works is fully protected. But the State could stop the sale of obscene matter. And the real problem confronting society is

not the use of obscene expressions by the individual, but the commercial exploitation of pornographic material.

The amici curiae brief filed in this case on behalf of "more than one hundred authors, editors and publishers" contains the following statements:

> "* * * We submit it is an urgent duty of this Court now * * * to announce, once and for all the nation, the right of the people to read this and any other work of literary, artistic or other import." (P. 6.)
>
> "Literature and art, no less than motion pictures, are paramount means for the circulation of ideas and for the carrying-out of this nation's deepest dialogue. Only by affording the widest possible public access to them will the historic function of freedom of expression be fulfilled." (Pp. 10-11.)
>
> "These (national standards) ought embrace nothing less than the right of every adult person, whatever the State in which he may reside, to read the literature and view the art of his choice * * *" (P. 12.)

Obviously, "the right of the people to read" is totally inconsistent with a copyright owner "exercising the right to exclude others from using his property." (*Fox Films v. Doyal, supra.*) Likewise, this right of the copyright owner is totally inconsistent with "affording the widest possible public access" to books and other forms of expression.

The very purpose of securing a copyright is to prevent free distribution and access to the copyrighted

material. It may be suppressed entirely. Even if the copyright owner does commercially exploit the material, it is self-evident that the increase in cost to the public, because of the royalty customarily associated with copyrighted material, is in and of itself an inhibiting factor during the life of the copyright.

An exclusive monopoly on the right to "print, reprint, publish, copy, and vend the copyrighted works" is hardly Freedom of Speech and Press.

If material is copyrighted, it is within the sole discretion and tender mercies of the copyright owner as to whether or not any person, adult or otherwise, shall be permitted to read the material; the copyright owner, at his slightest whim, may completely suppress the material, or may permit those who reside in one state to read it, but deny the right to those who reside in other states.

Surely we can not deny to a state the power to exclude obscene material on the basis that to do so is an unconstitutional infringement on the right of Free Speech and Press, yet grant to a copyright holder the right to exclude his copyrighted material, regardless of its nature, on the basis that he has a property right which may not be infringed upon, a property right which transcends the constitutional guarantee of Free Speech and Press.

From their brief it is clear that counsel for "more than one hundred authors, editors and publishers" have unequivocally taken the position that no law should operate to prevent the free and unrestricted distribution of so-called literary works; that every adult in every state should have the opportunity to read the literature

of his choice. This necessarily implies that in their opinion the copyright law is invalid.

It is only logical to assume that counsel for such authors, editors and publishers discussed with their clients the legal implications of the position taken by them. It would be unreasonable to even suggest that such counsel would attempt to destroy all laws impinging upon the right of free speech and press, which in their view must likewise include the copyright law heretofore so extensively used by their clients, without first ascertaining that their clients were desirous of losing the copyright law in order to gain unbridled Free Speech and Press.

Consequently, it is especially appropriate that this court should face the issue here presented, and determine whether or not the copyright law unconstitutionally interferes with Free Speech and Press, or if copyrighted material is removed from the realm of Free Speech and Press when the author exercises his option to convert such material into property.

While it must necessarily follow that the copyright law is invalid if it purports to cover material subject to the constitutional guarantee of Free Speech and Press, we again emphasize that it is our contention that the copyright law does not and was not intended to cover material to which the constitutional guarantee of Freedom of Speech and Press extended. When the author avails himself of his right to copyright his works, he has made such works property; he has removed it from the public domain. Yet it is only to expressions within the public domain that Freedom of Speech and Press apply. The right granted by the

constitutional guarantee of Free Speech and Press is too broad to apply to anything not in the public domain. Stated conversely and more precisely, everything to which the constitutional guarantee of Free Speech and Press is applicable must, by the very nature of this guarantee, be in the public domain.

The constitutional guarantee of Free Speech and Press extends to all, and the right of "publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms." So *all* (not merely the copyright owner) may publish and disseminate *any* material within the scope of such constitutionally protected freedoms.

No one may validly claim *both* the constitutional guarantee of Free Speech and Press, and also the exclusive right to do what such constitutional guarantee grants to all.

Counsel for "more than one hundred authors, editors and publishers" profess the deep concern of their clients lest even one person be denied the opportunity to read even one book due to the voice of the community's conscience, acting through government, prohibiting the sale of obscene matter. They complain that the standards established by this Court, by which to judge obscenity, and to regulate the exercise of government actions, are too vague, uncertain and indefinite. But how real is this concern?

These same publishers, acting through their censors, (euphemistically called editors) each day effectively supress more written material than has been suppressed or attempted to be suppressed by government action

in this country since the adoption of the Constitution! Under the decisions of this Court, destructive censorship by government is impossible. All that can be suppressed by government is that which is obscene, as determined by standards established by this Court.

But consider the very real and effective censorship wielded by those who so vehemently oppose any government action.

Their censors, with no standards other than their unrestricted personal opinions, censor all material submitted to their publishers. And if these censors, however arbitrarily, reach the conclusion that the material would not have popular appeal—would not be profitable to publish—they effectively censor it by rejection. Are they then so concerned for fear that their actions will deny even one person the right to read that material?

Yet Freedom of Speech and Press is most needed to protect that which is unpopular. Surely this is a clear violation of the purpose, spirit and intent of these constitutional guarantees.

On the other hand, if these censors determine that the material submitted would have great public appeal, would be profitable to publish, that the public would avidly desire to read it, they promptly copyright it so that none may read it without paying tribute to these censors and their masters.

Is it the true function of the great constitutional guarantee of Free Speech and Press to protect this system or is this system a complete perversion of what was intended?

Shall the clients of counsel who filed this amici curiae brief continue to have almost absolute and un-

limited control over what may be censored and suppressed, and what may be published and distributed? Shall the still, small voice of conscience, as expressed by government action in prohibiting obscenity, be forever silenced so that only the publishers may decide what may be read—and what may not be read—by the American public?

If this court holds that copyrighted material is within the realm of constitutionally protected Free Speech and Press, if these publishers are to wield this great power of censorship and suppression, then this court should guide and control the exercise of such power by establishing standards equally definitive to those applicable to government action.

We contend that Freedom of Speech and Press and the copyright law can co-exist. Each has its function to perform. But the functions are different. And they apply in different areas of our system of government. Freedom of Speech and Press is a human right, equally available to all, predicated on the theory that all should have the right to freely express their opinions, ideas and beliefs without fear of reprisal. The copyright law grants a discriminatory property right to the gifted few who are capable of writing material which can be successfully exploited commercially, predicated on the theory that, but for this economic reward, this special privilege, these gifted few would not use their God-given gifts.

It is unconscionable to even suggest that on the one hand the law grants by copyright to these gifted few a property right which as to the copyrighted material effectively denies the right of Free Speech to the com-

mon man, and on the other hand protects with the cloak of Free Speech the material which is the subject of the copyright granted to the gifted few.

Is it consistent with our philosophy of government for a gifted few authors to have both Free Speech and exclusive property rights in copyrighted material, and the common man to have neither a property right nor the right of Free Speech as to such copyright material?

Let the gifted few authors have the exclusive property rights granted by a copyright, but do not further cloak such property rights with Free Speech. Do not deny the main attributes of Free Speech—the right "to print, reprint, publish, copy, and vend"—to all but a gifted few authors, and then also give these gifted few the exclusive right of Free Speech as to such copyrighted material.

II.

The Constitutional Guarantee of Freedom of Speech and the Press Does Not Protect Obscene Matter.

This Court, in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476 (hereinafter referred to as *Roth-Alberts*), held, that obscenity is not within the constitutionally protected speech or press, stating:

> ". . . There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene . . . *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight*

> *social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."*

The emphasis was added by this Court, so important was such principle.

This Court further stated in *Roth-Alberts,* at page 484:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 states and the 20 obscenity laws enacted by the Congress from 1842 to 1956."

Now it is urged that all of this be abandoned in favor of some theory that freedom of speech and the press in the field of obscenity and pornography should be virtually absolute.

Petitioner in his brief (p. 52) urges reliance solely on laws dealing with sexual *misconduct,* without invading what he terms the area of protected expression, even if crudely and obscenely describing and urging such illegal acts.

The American Library Association in its amicus curiae brief in support of petitioner (p. 28) urges that the persuasion of public opinion should be the only ac-

ceptable censor except where society or one of its members is wrongfully *damaged*.

The more than one hundred authors, editors and publishers in their amici curiae brief (p. 16) take the view that the "Roth-Manuel Enterprises" rules for the testing of expression should be qualified so as to remove all threat to any material not worthless, and permit no finding of worthlessness where there are persons to assert its worth.

To require that a prosecution for the publication of obscenity depend upon a showing that the material actually results in damage to someone imposes an impossible burden. Even if such damage could be proved, it is like granting immunity to shooting in the streets unless some person is actually hit. And to assert that worthlessness does not exist where there are persons to assert worth, is granting license to a publisher of obscenity who has friends.

The end result of any such abandonment of the rules expressed in *Roth-Alberts* is the declaration of an absolute constitutional freedom to express and publish the obscene. Nor could such absolute freedom of expression be logically confined merely to the obscene. If curtailment of obscenity be abandoned, so must curtailment of the other aspects of expression.

Such absolute freedom would create chaos under a Constitution certainly never designed for that purpose.

It has been said that our Constitution had within itself the seeds of its own destruction. Such statement

can be readily proven correct by construction of it in such a manner as to create chaos. Under the "absolute" freedom theory a person in the exercise of free speech might say anything, anywhere, at any time, and enjoy immunity from laws against libel, slander and perjury made impotent by this absolutism.

Furthermore, no executive or judicial rule or regulation restricting free speech could stand if laws enacted with the dignity of legislation cannot reasonably restrict expression. Court rules specifying time limits for arguments, or prohibiting spectators from talking in the courtroom, or getting up and arguing a case, become invalidated. The very absurdity of the result demonstrates the fallacy of the absolute freedom theory.

The rules of *Roth-Alberts* are the culmination of many years of judicial experience in reaching a balance between the individual's constitutional right of freedom of expression and the sovereign's maintenance of the social interest in order and morality.

As stated in *Roth-Alberts*, the protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Obscenity is certainly not required to further this ideal, and there appears no valid reason to abandon the doctrine that obscenity is not within the area of constitutionally protected speech, or to revise the definition of obscenity in a manner that guarantees the same result.

III.

California Has Enacted Obscenity Statutes Meeting the Constitutional Requirements Expressed by This Court.

This Court, in *Roth-Alberts*, presented the following definition of obscenity:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

And further, in footnote 20, page 487:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code, Sec. 207.10(2) (Tent. Draft No. 6, 1957), viz.:
>
> '. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . .' "

In 1961 California amended its obscenity statute (Penal Code Sec. 311.2) to provide:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute, or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4428, sec. 5.)

Section 311(a) of the Penal Code defines "obscene" to mean:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or escretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." (Stats. 1961, c. 2147, p. 4427, sec. 5.)

The phrase "utterly without redeeming social importance" appears to be taken from *Roth-Alberts,* at page 484.

It is clear that California, in enacting these statutes, has so closely followed the *Roth-Alberts* case that in effect this Court has written them.

Petitioner urges that to define obscenity in terms of its appeal to the "average person, applying contemporary community standards" will result in such "average person's" rejection of that of no social importance to him, with the resulting suppression of such material. Petitioner quotes Lockhard and McClure (*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. Law Review, 5):

> "The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that is of social importance to them."

Such argument however, strains at the meaning of the word "average" as used in the definition. The word as used certainly was not meant to exclude any

imaginary top or bottom percentage of persons based on their education, income, social standing or reading habits. It was obviously used to forestall the possibility that suspect material be judged by extremists; the ultra-prudish on one hand and degenerates on the other.

In instructing the jury on the California law of obscenity, the trial judge did not limit the application of contemporary standards to the Los Angeles community, but in fact couched the instruction in the general terms of Section 311(a) and the *Roth-Alberts* cases: "Applying contemporary standards . . . which go substantially beyond customary limits of candor in description or representation of such matters. . . ." [Plaintiff's two-page instruction on Penal Code Section 311, subdivision (a), citing *Roth v. United States* and *In re Harris*, and R. T. Vol. XII, p. 1174, lines 13-19.]

While there may have been academic discussions at the bench as to the term "community" as used by this Court, it is most significant that the term is not even used in the California definition of obscenity. In the course of the trial there may have been instances where counsel, in interrogation of witnesses, referred to the Los Angeles area in this regard. However, the overall conduct of the trial could hardly be said to have affected the meaning of the law of California or the specific instruction on the point given by the trial judge.

Furthermore, in the course of the trial, petitioner did not indicate a belief that the contemporary community standards of Los Angeles were more strict than those of any other community nor did he offer proof. In fact, he would have been hard put to so prove, in that Los Angeles is a city whose reputation for liberal-

ity and sophistication in sexual attitude prompted the following from *A Report on Obscene Matter sent through the mail to the House Committee on Post Office and Civil Service by the Subcommittee on Postal Operations,* 86th Cong., 1st Sess. (1959). (Quoted in Lockhard and McClure, *supra*, p. 36, footnote 174):

> "Difficulties in prosecuting violators resulting from liberal attitudes of courts and juries—particularly in certain metropolitan areas, notably Los Angeles and New York—have established virtual sanctuaries allowing dealers in publications devoted exclusively to distorted sex to operate in defiance of the Post Office Department's best efforts to bar their use of the mail or bring them to justice."

There is nothing in the instructions of the court or in the conduct of the trial indicating that the jury, in determining the guilt of petitioner, used the standards of any particular community other than the community comprising the entire United States.

IV.

The Book Tropic of Cancer by Henry Miller Is Obscene Within the Meaning of the California Statutes.

As the California legislature in enacting the laws under which petitioner was prosecuted followed the rules laid down by this Court, so did the trial court in the conduct of this case. The requirement of scienter was met. Also, the testimony of expert witnesses was offered by both sides. The admission of such testimony followed the rule expressed by the Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879,

366 P. 2d 305, that the exclusion of expert testimony in an obscenity case was a violation of due process of law. Such holding of course follows the lead of Mr. Justice Frankfurter concurring in *Eleazar Smith v. California, supra.*

In the trial of the case expert witnesses were utilized to the fullest extent. Respondent produced eighteen experts and petitioner nearly that many. Their testimony occupied the major part of the twenty-seven trial days. Certainly each side was offered every opportunity to present its case to the jury.

When Mr. Justice Frankfurter, concurring in *Eleazar Smith v. California,* indicated he believed the testimony of expert witnesses to be so important that he would make the right to introduce such evidence a requirement of due process in obscenity cases, and the Supreme Court of California followed his reasoning in *In re Harris, supra,* these justices manifestly must have believed that such evidence was thus entitled to *great weight,* by the jury and the trial judge, and on appeal. It must follow that the testimony of the eighteen expert witnesses produced by the People of the State of California at the trial of this action is entitled now to the most careful attention in this Court. Assuredly the opinions of such experts who saw fit to take the witness stand, be sworn, and be subjected to cross-examination, are entitled to more consideration than the views of critics expressed as a part of earning a livelihood.

Exerpts from the testimony of plaintiff's eighteen expert witnesses are attached as Appendix B.

The Supreme Court of California in *Zeitlin v. Arnebergh,* 59 A. C. 930, relying heavily on the Court of

Appeals of New York in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, construed the California obscenity laws as prohibiting only "hard core" pornography and held that *Tropic of Cancer* did not reach that plateau. However, in voicing the "hard core" rule, such court erroneously determined that the opinions of this Court necessitated its adoption.

The opinion of Mr. Justice Harlan in *Roth-Alberts*, relied upon by the California court as authority for the adoption of the hard-core pornography concept, is but an exrpession of his individual ideas in concurrence and dissent. It was not the view of the majority of the court.

When it came Mr. Justice Harlan's turn to announce the judgment in *Manual Enterprises v. Day* (1962), 370 U. S. 478, he stated (at 370 U. S. 489):

> "At least one important state court and some authoritative commentators have considered Roth and subsequent cases to indicate that only 'hard-core' pornography can constitutionally be reached under this or similar state obscenity statutes. See *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681; Lockhart & McClure, supra, at 58-60. Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot, under any permissible constitutional standard, be deemed to go beyond the pale of contemporary notions of rudimentary decency."

Certainly such is not a declaration that the First Amendment protects all suspect material other than hard-core pornography.

It must be emphasized that Mr. Justice Harlan, concurring in *Alberts* but dissenting in *Roth*, wanted to limit federal obscenity censorship strictly to hard-core pornography but to grant the state somewhat broader censorship powers, the limits of which he did not spell out. (Lockhard & McClure, in *Censorship of Obscenity*, 45 Minnesota Law Review 5, at p. 28.)

It is respondent's intention to petition this Court for a writ of certiorari in *Zeitlin v. Arnebergh, supra*, and the notice of such intention has been filed.

It is most significant that shortly after *Zeitlin v. Arnebergh*, the New York Court of Appeals (the very court relied upon by the California Supreme Court), declared *Tropic of Cancer* to be "hard core" pornography. (*People v. Fritch*, ... N.Y. 2d ...., ... N.E. 2d .....)

Respondent's position as to the obscenity of the book in question can be no better presented than to quote the New York Court of Appeals in such case:

> "In order to render more meaningful our duty to make an independent constitutional appraisal we feel compelled, though loath to do so, to refer to certain words and passages contained in the book, with all due respect for the dignity of this court and the judicial system. We do so to bring to the attention of the bar the factual basis for our conclusion that the book is obscene, as well as to demonstrate that this conclusion is not predicated upon any preconceived notions or predilections on our part.
>
> "Throughout its pages '4 and 5 letter' vile and filthy words and derivatives thereof, by conserva-

tive estimate, are used more than 300 times. We are mindful that the use of these words, standing alone, may not necessarily render the book obscene by legal standards. We therefore are constrained to set forth some excerpts which typify the manner in which this language is used throughout the book.

"On page 5* of the book the central character describes his desires for Sylvester's wife, Tania:

" 'Where now is that warm cunt of yours, those fat, heavy garters, those soft, bulging thighs? There is a bone in my prick six inches long. I will ream out every wrinkle in your cunt, Tania, big with seed. I will send you home to Sylvester with an ache in your belly and your womb turned inside out. Your Sylvester. Yes, he knows how to build a fire, but I know how to inflame a cunt. I shoot hot bolts into you, Tania, I make your ovaries incandescent. Your Sylvester is a little jealous now? He feels something, does he? He feels the remmants of my big prick. I have set the shores a little wider, I have ironed out the wrinkles. After me you can take on stallions, bulls, rams, drakes, St. Bernards. You can stuff toads, bats, lizards up your rectum. You can shit arpeggios if you like, or string a zither across your navel. I am fucking you, Tania, so that you'll stay fucked. And if you are afraid of being fucked publicly I will fuck you privately. I will tear off a few hairs from your cunt and paste them on Boris' chin. I will bite into your clitoris and spit out two franc pieces. . . .'

*Page references are to pages in the hardback edition.

"Describing another sexual episode, at page 18 of the book the central character says:

" 'In the lavatory I stand before the bowl with a tremendous erection; it seems light and heavy at the sametime, like a piece of lead with wings on it. And while I'm standing there like that two cunts sail in—Americans. I greet them cordially, prick in hand. They give me a wink and pass on. In the vestibule, as I'm buttoning my fly, I notice one of them waiting for her friend to come out of the can. The music is still playing and maybe Mona'll be coming to fetch me, or Borowski with his gold-knobbed cane, but I'm in her arms now and she has hold of me and I don't care who comes or what happens. We wriggle into the cabinet and there I stand her up, slap up against the wall, and I try to get it into her but it won't work either. No matter how we try it it won't work. And all the while she's got hold of my prick, she's clutching it like a lifesaver, but it's no use, we're too hot, too eager. The music is still playing and so we waltz out of the cabinet into the vestibule again and as we're dancing there in the shithouse I come all over her beautiful gown and she's sore as hell about it.'

"Discussing his experience with a prostitute on a street corner in Paris, he states (p. 42):

" '* * * there was always a cluster of vultures who croaked and flapped their dirty wings, who reached out with sharp talons and plucked you into a doorway. Jolly, rapacious devils who didn't even give you the time to button your pants when it was over. Led you into a little room off the

street, a room without a window usually, and, sitting on the edge of the bed with skirts tucked up gave you a quick inspection, spat on your c....k, and placed it for you.'

"As can be plainly seen, the book is a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest. It is devoid of theme or ideas. Throughout its pages can be found a constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. It is a blow to sense, not merely sensibility. It is, in short 'hard core pornography', dirt for dirt's sake (*United States v. 'Ulysses,'* 5 F. Supp. 182), and dirt for money's sake (*Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 692). We see no reason for adopting an unrealistic appraisal of the nature of this book when there is such overwhelming proof of its incompatibility with the current moral standards of our community. If, as the County Court held, this book is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held to be obscene under any established legal standard."

V.

A State Court Jury's Determination of Obscenity When Based Upon a Valid Statute and Definition of the Term Must Not Be Disregarded.

This Court is here presented with the ultimate question of the stability of a state jury's verdict of obscenity fortified by the testimony of eighteen expert witnesses who, by their stature, are entitled to receive the utmost consideration and respect.

While it may not be clear as to whether an independent judicial review by an appellate tribunal of the material in question is *required*, of course such review may be practiced. (See Lockhart and McClure, *supra*, p. 114.) However, for appellate courts to carry this independent review to the extreme of remaining oblivious to the verdict of juries is to relegate trial by jury in obscenity cases to mere frivolity.

As expressed by Judge Learned Hand in *United States v. Levine* (1936), 83 F. 2d 156:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. U.S., supra, 161 U.S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal abberations of the jurors. We mentioned some of these in U.S. v. One Book Entitled Ulysses, supra, 72 F. 2d 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U.S. (C.C.A. 7), 166 F. 9); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a

llogism of which they are to find only the minor emise, but really a small bit of legislation ad , like the standard of care."

Recognizing that in many obscenity cases the appellate courts have before them merely the suspect material itself, and are really in the same position to judge it as the jury, in the instant case there were expert witnesses expressing opinions. Thus, the credibility and the weight to be given to the testimony of these witnesses testifying for each side, had to be determined by the jury. And such determination of credibility, knowledge and sincerity of witnesses, and the weight to be given to their testimony, so basicly within the sole province of the jury, and expressed in the verdict, must not be rightly regarded.

In exercising its independent judgment of the material now in question, this Court should remain ever mindful that a jury worked at the problem for twenty-seven trial days. Its verdict is entitled to due respect.

Conclusion.

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles should be affirmed.

Respectfully submitted,

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Deputy City Attorney,

Attorneys for Respondent.

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113, Trial Court No. 151588.

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

For Appellant—Brock and Fleishman by Stanley Fleishman.

Amicus Curiae in Support of Appellant—A. L. Wirin, Fred Okrand and Nathan L. Schoichet.

For Respondent—Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Edward P. George, Deputy City Attorney.

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of P.C. § 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers

the question of constitutionality, or whether the book was "utterly without redeeming social importance" within the definition of P.C. § 311 (a). Of course, the jury makes no specific finding of constitutionality, but the trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance", a finding amply supported by respondent's expert witnesses. With this finding we must agree, since as we stated in *People v. Harris* (1961) 192 Cal.App.2d Supp. 887, 894: "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In *Roth v. United States* (1957) 354 U.S. 476, 490, 1 L.ed. 2d 1498, 1510, as we pointed out in *People v. Harris, supra,* p. 894, the Supreme Court approved an instruction informing the jurors that they were "the exclusive judges of what the common conscience of the community is . . . ."

The recent case, *People v. Williamson* (1962) 207 A.C.A. 885, 888, held that ". . . whether a particular book is obscene is primarily one of fact," relying on *Roth-Alberts* which approved the definition of obscenity stated in *People v. Wepplo* (1947) 78 Cal.App.2d Supp. 959, 961. The Supreme Court of California in *In re Harris* (1961) 56 Cal.2d 879, 880, stated: "The

standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether *to the average person* [emphasis ours], applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]" *People v. Williamson, supra,* quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in P.C. § 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p.12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the matter can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: *Times Film Corp. v. City of Chicago* (1957) 355 U.S. 35, 2 L.ed.2d 72; *Sunshine Book Co. v. Summerfield* (1958) 355 U.S. 372, 2 L.ed.2d 352; *One, Inc. v. Oleson* (1958) 355 U.S. 371, 2 L.ed.2d 352 (all per curiam opinions merely citing the *Roth* case); *Kingsley Corp. v. Regents of Univ. of N.Y.* (1959) 360 U.S. 684, 3 L.ed.2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L.ed.2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but

to three of seven New York State Justices' opinion, 151 N.E.2d at 200, and to the scope of the applicable New York law, and stated: "The opinion . . . , as . . . with §§ 122 and 122-a themselves when independently read in their entirety, . . ." and at p. 1527 of 3 L.ed.2d, Justice Harlan said: ". . . I have viewed this film"); *Manual Enterprises, Inc. v. Day* .....U.S. ....., 8 L.ed.2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

Moreover, the book here in question has been read by this court, unlike the U.S. Supreme Court, except for Justice Harlan, in the *Roth* case, (1957) 354 U.S. 476, 1 L.ed.2d 1498, 1509, 1514. From this reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous

relationships with Paris street women and others, whom he frankly and appropriately terms "whores", as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four-letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his self-incrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary standards, and is predominantly an appeal "to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in P.C. § 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so; so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although *Roth v. United States* (*Alberts v. California*) 354 U.S. 476, 1 L.ed.2d 1498, states that "ideas having even the

slightest redeeming social importance . . . have the full protection of the guaranties . . .", we must consider the language of the court, immediately following the above: "unless excludable because they encroach upon the limited area of more important interests." (p. 484 U.S., 1507 L.ed.2d) We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest *redeeming*. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: 'The right of trial by jury shall be *secured to all*, and remain inviolate. . . ." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon *the fact* of guilt or innocence." (Emphasis ours.) *People v. Stoll* (1904) 143 Cal. 689, 696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a *trial court* to the same extent and in the same degree as has the accused. (*People v. Stoll*, 143 Cal. 689, 696 . . .)" (Emphasis ours.) *People v. Wisecarver* (1944) 67 Cal.App.2d 203, 209, quoted in *People v. Misner* (1955) 134 Cal.App.2d 377, 380-1. See also 29 Cal. Jur.2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to, but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate". That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings. This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated Oct. 24, 1962.

/s/ Huls
Judge

I concur:
Swain
Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for

the purpose of appealing to the non-literary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

/s/ Smith
Judge

Order Certifying Cause to District Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113. Trial Court No. 151588.

This action is hereby certified on our own motion to the District Court of Appeal. The judgment and opinion of this court was filed October 24, 1962. It affirmed an order granting probation made after defendant was found guilty of exhibiting, distributing, offering to distribute and having in his possession with intent to distribute, obscene matter, to-wit, the book "Tropic of Cancer", in violation of P.C. § 311.2. This court held that the book was obscene within the meaning of P.C. § 311 (a).

The following important questions of law should be settled:

1. Is the book "Tropic of Cancer" obscene?

2. If the book has literary merit does that alone give it redeeming social importance which takes it out of the class of being obscene?

Dated October 24, 1962.

By the Court.
Swain
Presiding Judge
/s/ Huls
Judge
/s/ Smith
Judge

APPENDIX B.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, Sec. 311 provides:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechani-

cal, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, Sec. 311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits; distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4427, 4428.)

Title 17, Section 1 of the United States Code annotated, reads, in part:

Chapter 1—Registration of Copyrights.

Sec. 1. Exclusive rights as to copyrighted works

"(a) To print, reprint, publish, copy, and vend the copyrighted work;"

———

APPENDIX C.

Dr. Frank Baxter

[Rep. Tr. Vol. 9, pp. 350-498]

Lecturer and television personality [p. 350, lines 23-24];

Professor Emeritus of English and American Literature, University of Southern California for 31 years [p. 351, lines 1-3; 18-20]; Chairman of the English Department, U.S.C. for eight years [p. 351, lines 9-11]; Resident of Los Angeles County since 1930 [p. 350, lines 15-17].

Bachelor of Arts and Master of Arts degrees, University of Pennsylvania [p. 352, lines 16-18]; Doctor of Philosophy degree from Trinity College, Cambridge, England [p. 352, lines 19-21]; recipient of four Honory Doctorates, three in Letters and one in Fine Arts [p. 358, lines 16-17].

Author of seven articles for the Encyclopedia Britannica [p. 348, lines 24-25].

Past President of Phi Beta Kappa Chapter at U.S.C. [p. 353, lines 19-21]; served as First Chairman, U.S.C. Academic Senate [p. 353, lines 22-25].

The first recipient in the United States to receive, as an individual, the George Foster Peabody award, a national honor for excellence in television programming [p. 355, lines 9-26]; has received approximately 35 national honors for pioneering in educational television, including: The Sylvania, a citation from the National Association for Better Radio and Television, two Ohio State awards, and seven "Emmys" from the National Academy of Motion Picture Arts and Sciences, an "Emmy" being a statuette similar in nature to a

motion picture "Oscar," awarded by the television industry to those in the industry whom the members deem to be worthy of praise [p. 357, lines 2-12].

Dr. Baxter testified that *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Penal Code Section 311(a) [p. 360, lines 8-19; p. 372, line 21, to p. 373, line 25].

Showing Dr. Baxter as a scholar who has not lost the community pulse, the witness succinctly states the problem of censorship and the community:

> "Like every other member of society who has any claim to civilization, I am, of course, always very much worried by the problems of censorship imposed on the opinion or will of others or of the State upon the opinion or will of the individual.
>
> "Yet we all know that in a complex society of ours we live by rules. We have to. Without standards and rules, such simple matters as driving on the right has been argued classically, I have no doubt, as an infringement of individual enterprise.
>
> "We know that we can't sell with impunity cancer cures by mail, which are fraudulent quackeries. We know you can't sell pornographic postcards in the school yard. There is a level, in short, that is the great concern and the difficulty in the twilight zone of all censorship.
>
> "We know that society has to have standards and has to have rules. Our American society, it seems to me, grants a great deal of leeway, a tremendous deal of leeway. But down here there is a level beyond which it is not socially desirable, safe, or healthy for people to be allowed to go.

"There are just things you can't do in society if society is going to hang together in our populated cities like ours. Every child has to learn rules. These things are important. Each one is, of course, philosophically an infringement of liberty, perhaps. . . ."

Dr. Baxter unmistakably asserts his position that *Tropic of Cancer* is obscene and below the level of community tolerance:

"I felt that I had to state that position, that there is a line. Now, my position, very clearly, is that this book falls below that line. Not only does it deal with matter of sex, which is quite all right —this is a very fact of life, it's a great concern of modern literature—but it does it in a way that seems to me purposely and determinedly obscene, purposely and determinedly shocking" [p. 374, line 7. to p. 375, line 25].

Dr. Baxter tells why he feels *Tropic of Cancer* is shocking:

"I think the book is shocking in a number of ways: I would hate to see a young person, young woman, young man, boy or girl meeting sex in this book; for obviously the author has a revulsion against all beauty, truth, and good, and sex to him is a frankly animal thing.

"The only four-letter word of which he finds obscene, I think, is 'love.' Any of the values which give decency and order to life are trampled on in this book.

"I feel that it would be a shock, it would be a trauma in the inner psyche of a young man or

woman, who would turn with a revulsion from the whole business of man and woman in life" [p. 376, lines 14-25].

Expounding on Miller's purpose in writing *Tropic of Cancer:*

"When a man says, 'This isn't a book. This is a libel, slander, defamation of character. This is not a book, in the ordinary sense of the word. This is a prolonged insult, a gob of spit in the face of art, a kick in the pants to God, man, destiny, time, love, beauty' [quoting from Miller's purpose, p. 2, Tropic of Cancer], and then proceeds with all the apparatus of obscenity to follow up in all these pages this anarchic declaration against all the values by which men live, arrived at slowly. I regard this book as below the line, that line of censorship, that line of tolerance" [p. 375, line 26, to p. 376, lines 1-9].

Asked whether *Tropic of Cancer* has redeeming social importance to the average person in the community because this book would lead to a healthier, more frank, less inhibited sex life for the average person [as defense witness Dr. Blake Nevius, Chairman of the English Department, U.C.L.A. testified], Dr. Baxter replied:

"No. As I have just said, really it [*Tropic of Cancer*] seems to me rather to pollute the stream rather than to clarify it. It doesn't reduce life to what I consider to be the basic essentials but rather it walks into an area where the basic essentials seem to me to be perverted and twisted.

"This is no life which I as a soldier or one who has worked in theaters or sailed as a sailor on

a British ship, or worked in hospitals, can recognize. I may be naive, but this seems to me to be a strange and shocking stepping aside out of life. And whatever it says about its particular sort of life seems to me to be almost clinical; that this would belong, perhaps, better in a medical work dealing with abnormality than with any novel addressed to the general public, that average decent person" [p. 377, lines 6-19].

Responding to testimony propounded by defense experts [Dr. Charles Kaplan, Chairman of the Department of English, Valley State College] that *Tropic of Cancer* is in the main stream of American literature in the same tradition as Thoreau, Whitman, Emerson and Mark Twain's *Huck Finn:*

"I think that Emerson's horror, could he in another world hear that question, would be cosmic. Thoreau was a petty rebel against many things and an important rebel against many others. But neither Emerson nor Thoreau nor Walt Whitman, who, say what you will, is a very healthy man who said, 'It is good to be alive.' It is good to be a man,' would accept this as the heritage of the tradition that they established.

"As for Mark Twain, he might have read this but for the wrong reasons, I'm sure. He was a very earthy man and in all Mark Twain you can't find ten lines that will compare to ten pages, let us say, that will compare to any five lines that I can come on almost at random here in the appeal as prurient to the average person under American standards" [p. 382, line 18, to p. 383, line 11].

Dr. Baxter replies to defense testimony [Rev. Glenn Whitlock] that *Tropic of Cancer* has redeeming social importance because Miller is attempting by tearing down some of the falseness of life to say what is real in life, and in doing so he is tearing down some values and saying they are not important:

> "That is a decent and valid function of the artist always, as much to clear away as to build. But it seems to me that when a man says, 'I am going to write a book which will be a prolonged insult, a gob of spit in the face of art, a kick in the pants to God, man'—now man is the theme of the whole business of literature. He is going to kick man out; he doesn't mean anything. He is pus, he is just nothing. 'I am going to throw out destiny, time, love, beauty,' I don't know what social value emerges here.
>
> "At the end of the book, the man returns like the dog to his vomit. He isn't redeemed. The reader is not put through a purgation, as the ancient Greeks had it, a washing, a purging of terror or pity to come out stronger.
>
> "I think the book is all of a piece. It ends as it begins. I can't feel out of this emerge any suggestion of what the man holds to be true and valid and good in the world. In fact, he denies all those words.
>
> "All I can say is this seems to be a tissue of calculated offense" [p. 385, line 17, to p. 386, line 9].

Commenting on Miller's lack of artistic integrity, Dr. Baxter states:

> ". . . Art is selective. But when an artist addresses himself to a public, he cannot, in the interests of a successful achievement of his art, violate all the commons and standards of that particular group to which he speaks. . . . Obviously he is speaking to the world. He makes that clear. This is a book to end all books, this is the final, last gasp of wretched, stinking, lousy, polluted man, to sum it up in gentle terms" [p. 436, lines 1-11].

And further:

> "He [Miller] repudiates the world. He flings us back into anarchy and chaos. The artist's business is to find meaning. His meaning is meaningless" [p. 411, lines 7-9].

Answering defense testimony [Dr. Otto Ficke, Assistant Professor of English, Los Angeles State College] that *Tropic of Cancer* has redeeming social importance, in that Miller depicts the sex life as it exists in the world of the average person in the community of Los Angeles:

> "If this book depicts the private life of the average citizen of Los Angeles, I welcome with great joy the hydrogen bomb. I can't believe that it depicted the life of France when this book was written, the expatriates in France. I can't think that it depicted the artistic life of France.
>
> "Though if it did, it would explain what happened to France at the beginning of World War II, although I think France would have exploded even before that had this been—No, no, this is an odd little corner, unless I am a very simple fellow.

"This is not a reproduction of the daily life of the average citizen in Los Angeles County. I sincerely doubt that" [p. 389, line 21, to p. 390, line 8].

Negating defense testimony [Rev. Paul Sawyer, Unitarian Minister] that Miller's work has redeeming social importance because it is a deeply religious book showing Miller as a religious man whose tormented soul-searching and candor might be compared to Christ's retreat into the wilderness:

"Well, my head reels at this semantic game. A religion is a philosophy of life which people believe so implicitly and fervently that they can live by it. I see no questing here for something by which a man can live; no attempt to explain the relation of man to time and the gods, the meaning of the world. No attempt to explain the sinister conspiracy of time and chance against man.

"I don't know what it means when it says 'This is a religious book,' and I suspect that we are having a sort of semantic holiday here when the term is used. Whatever it is, it isn't religious, I don't think.

"If it had a sort of questing zest—it might be going for a very ignoble target—I would accept it; but I see no target at all here of this descent into this festering muck. I see no end result which I could call religious nor do I see anything in the tome which suggests religion" [p. 392, line 16, to p. 393, line 6].

Dr. Baxter takes exception to defense testimony [Dr. Lawrence Clark Powell, Librarian, U.C.L.A.] that

Tropic of Cancer is a socially significant document of Bohemian expatriate life of the 1930's:

> "Out of the whole mass of men, one could imagine that somewhere there is a colony of one-legged, Chinese lepers with one eye. A man may write about them, the social significance for the generality of mankind would be little. I regard this society that he infested here as a society of a very few Chinese lepers with one eye and one leg. It's that remote from the current of the human race" [p. 466, line 26, to p. 467, line 7].

Dr. Baxter minces no words in finding an utter lack of redeeming social importance to *Tropic of Cancer:*

> ". . . I cannot find 150 lines in the whole book [*Tropic of Cancer*], in this big book, which seemed to me to be redeeming" [p. 379, lines 3-5].

Emphasizing the effect of *Tropic of Cancer* on the "average person" in the community, and dwelling upon the word "redeeming," Dr. Baxter continues:

> "To the average person in the community, I can see no significance or social importance in this book. Granted that word 'utterly' is, of course, a difficult one, I grant that here and there there are pictures of the city at night, there are little intrusive passages which might perhaps, to some people, justify it but not to me; because it seems to me that the word 'redeeming' would imply that there was something in this book so transcendently important as to overrule the general impact of the book, which I find very distressing" [p. 383, lines 10-21].

And further:

> ". . . But again I can't feel that if you picked out on the pages of this book, which are over 320, let us say, if you picked out 20 pages which would be defensible, they would constitute enough redeemable, redemptive material to justify the ugliness, the scatalogy, the prurience of the rest" [p. 460, lines 18-22].

Mrs. C. H. Culbertson

[Rep. Tr. Vol. 3, pp. 529-542]

President of the State of California Congress of Parents and Teachers, also known as the PTA [p. 529, lines 16-17]. The California Congress of Parents and Teachers comprise an organization of over a million and a half members [p. 529, line 23], making this group the largest parent-teacher assemblage within the continental United States.

Mrs. Culbertson testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Section 311(a) of the Penal Code [p. 532, line 3, to p. 533, line 19].

Summing up *Tropic of Cancer,* Mrs. Culbertson stated:

> "I think it is a very filthy book" [p. 535, lines 6-7].

Arthur J. Kates

[Rep. Tr. Vol. 2, pp. 438-528]

Owner-manager of the Sunset News Co., 125 N. Westmoreland, Los Angeles [p. 440, lines 21-24], the largest distributor of periodicals in California, and

one of the two or three largest distributors in the continental United States [p. 442, lines 2-8].

Mr. Kates' Sunset News Co. distributes ninety per cent of all periodicals sold in the Los Angeles basin (roughly equivalent in area to Los Angeles County) [p. 442, lines 14-21].

Sunset News Co. distributes to 1400 different accounts [p. 443, line 9]; including such department stores in Los Angeles as Bullock's, the May Company, the Broadway, Robinson's [p. 443, lines 14-15]; such supermarkets as Ralph's, Market Basket, Alpha Beta, Safeway, Mayfair, A&P [p. 443, lines 20-24]; such drug stores as Owl, Thrifty, Save-on [p. 443, lines 8-12]; such bookstores in the city of Los Angeles as Fowler's, Pickwick, Campbell's, Martindale's [p. 444, lines 13-17], and such universities as U.S.C., U.C.L.A., Los Angeles State College [p. 444, lines 19-22].

The volume of Sunset News Co. periodicals sold to their 1400 accounts in 1961, included 22 million single magazine copies and 5 million copies of paperback books [p. 445, lines 4-8]. Sunset News Co. distributes between 200 and 250 different titles of books and magazines per week [p. 446, line 26].

The magazine titles run the gamut from Saturday Evening Post, Look, Life, Time [p. 515, lines 8-10]; to such girlie magazines of nude models and chorus girls as Dude, Gem and Playboy [p. 475, lines 1-3; p. 483, lines 16-18].

Mr. Kates has a Bachelor of Arts degree from Stanford University and was a member of Phi Beta Kappa while at Stanford [p. 439, lines 6-20].

Mr. Kates has been a resident of Los Angeles for 50 years [p. 438, line 23]; has been in the periodical distributing business for over 25 years in Los Angeles [p. 446, lines 8-11], and has by virtue of this experience, an intimate knowledge of the books and magazines that circulate as community standards in the community of Los Angeles [p. 446, lines 12-20].

The paperback edition of *Tropic of Cancer* was offered to Mr. Kates by Grove Press for distribution to his 1400 accounts prior to the arrest of defendant Bradley Reed Smith [p. 450, lines 15-27], an offer which Mr. Kates refused [p. 451, line 22].

Mr. Kates testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Penal Code Section 311(a) [p. 451, line 14, to p. 452, line 25].

Asked whether in his experience *Tropic of Cancer* goes substantially beyond customary limits of candor in description of sex, nudity or excretion in the community of Los Angeles, Mr. Kates replied:

> "I don't think there is any question about that." [p. 452, line 7].

As to the utter lack of redeeming social importance of *Tropic of Cancer,* Mr. Kates stated:

> "I was unable to find any redeeming social importance. I feel strongly that it is without it." [p. 452, lines 15-16].

In a graphic summation of both the author and *Tropic of Cancer,* the witness concludes:

> "I think that, by and large, the book, taken as a whole, is the demented outhouse scrawlings of a demented mind." [p. 453, lines 7-9].

Dr. Raymond Lindquist

[Rep. Tr. Vol. 5, pp. 894-937]

Senior Minister of the Hollywood First Presbyterian Church since 1953 [p. 894, lines 20-26].

Dr. Lindquist's church has a congregation of 8,000 members, making it the largest Presbyterian Church in the continental United States, and probably the largest in the world [p. 895, lines 3-9].

Dr. Lindquist received his Bachelor of Arts degree from Wheaton College, Illinois; attended Columbia University Law School for one year; acquired a Bachelor of Theology at Princeton Theological Seminary, and a Master of Arts in philosophy at Princeton. Dr. Lindquist is the recipient of an Honorary Doctor of Divinity degree from Cumberland University, Tennessee, and an Honorary Doctor of Laws from Bloomfield College, Bloomfield, New Jersey [p. 899, lines 11-18].

Dr. Lindquist, in addition to his position as Senior Minister of the Hollywood First Presbyterian Church, is also President of the Board of National Missions of the Presbyterian Church [p. 895, lines 22-23]; a Trustee of Princeton Theological Seminary [p. 896, lines 14-15], as well as a Director of the Presbyterian Ministers Fund, the oldest insurance company in the United States [p. 897, lines 2-3].

Dr. Lindquist testified *Tropic of Cancer* was "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 897, line 11, to p. 898, line 4].

Relating the obscene parts of *Tropic of Cancer* to the non-obscene portions Dr. Lindquist states:

> "You will find in a book . . . in this book, according to my thinking, islands of material like this, in an ocean of obscenity . . ." [p. 909, lines 6-8].

Commenting on what the witness feels to be the author's deliberate attempt at portraying obscenity without motivation:

> "It is a book that I read with great dismay. I wasn't shocked at it, but I was deeply dismayed, and I was impressed with what appeared to be a deliberate attempt from page to page to slide into the gutter without reason. There seems to be no motivation in my mind for wallowing in the dirt in this fashion." [p. 898, lines 7-13].

Dr. Howard S. McDonald

[Rep. Tr. Vol. 5, pp. 779-817]

President of Los Angeles State College [p. 779, line 23] since 1958 [p. 780, line 3]. Los Angeles State College has an enrollment of 16,000 students [p. 780, lines 6-7].

Past President of Brigham Young University [p. 781, lines 1-2]; Past President of the combined Los Angeles City and Los Angeles State Colleges from 1949 to 1958, with an enrollment of 28,000 students [p. 781, lines 8-18].

Bachelor of Science degree at Utah State University; Masters and Doctorate of Philosophy degrees from University of California at Berkeley.

Dr. McDonald testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as

this term is defined by Penal Code Section 311(a) [p. 783, lines 1-18].

After reading *Tropic of Cancer*, Dr. McDonald wanted "to take a bath":

> "When I read the *Tropic of Cancer*, I will use it as an illustration—I was disgusted. After I got through reading the book, I wanted to take a bath. That's the impression it gave me. I felt that I'd get veneral disease just from reading the book, it was so filthy, rather condoning that kind of life in the world." [p. 802, lines 18-23].

John Otis Carney

[Rep. Tr. pp. 831-875]

Professional writer [p. 831, line 20].

Bachelor of Arts in English from Princeton University [p. 831, lines 23-26].

Author of four published novels: *Love at First Flight, When the Bow Breaks, Yesterday's Hero* and *Good Friday, 1962* [p. 832, lines 11-15].

Author of the films: "Cinerama Holiday [p. 838, lines 7-10] and "Pete Kelley's Blues" [p. 839, line 4].

Author of articles for Collier's and Coronet magazines [p. 839, lines 19-21].

Mr. Carney has reviewed books for the *Chicago Tribune, Minneapolis Star* and the *Los Angeles Times* [p. 840, lines 9-11].

Author of television productions for Walt Disney, Jack Webb ("The D.A.'s Man") and has written the script for such television dramas as "Zane Grey Theatre," "The New Breed," and "Going My Way."

Mr. Carney testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Penal Code Section 311(a) [p. 841, line 8, to p. 842, line 4].

Mr. Carney states that as an author he is inherently opposed to censorship:

> "As a writer, I am naturally inherently opposed to censorship. I think that any writer, by his very nature, has sort of a burr under his saddle blanket. He wants to change the world for the better or else he wouldn't be a writer.
>
> "Therefore, any pressures that tend to make him back off on this become inimicable to his work as a writer. I think Budd Schulberg expressed it very well when he said, 'You scratch a novelist and underneath you find a moralist.' "

However, the lack of redeeming social importance of *Tropic of Cancer* prompts the witness to continue:

> "But I really believe that this book goes so far beyond having any social significance or importance that it vitiates its entire premise as a novel, as a work of art, and it vitiates its effectiveness" [p. 842, lines 7-21].

Mr. Carney, as an author, clearly and carefully defines the two-fold social obligation of any writer:

> "I think that the author has two responsibilities; one of them is to his own craft, to be honest as he can in his reporting; and the second responsibility is to the public at large. And its this area that I feel an author must not go beyond the limits. He must set these standards for himself and the standards are quite easy to find. I used the

analogy of writing profanity on the wall out there. I can't do it as an individual citizen nor can I do it really as an author" [p. 875, lines 12-20].

Mr. Carney interprets the significance of *Tropic of Cancer* in terms of a descriptive analogy to a World War II incident:

"Now the book [Tropic of Cancer] reminds me, actually, of an incident that took place during the war. And this was a Japanese officer who came rushing down out of the hills determined to make war, and when he got down—this happened on the Island of Guam—he found everyone going to movies and PX's, and no military people around. And here he was so anxious to fight this battle and yet nobody would fight him.

"And he finally went into an airplane—it's a tragic little story, really—and got in the plane behind the pilot's seat and he was so mad by this time he had to blow something up. He had two grenades.

"He got in the plane and the mechanic got in the plane. He thought it was the pilot. And the poor fellow blew the plane apart.

"What he didn't realize was that the war had been over for nearly a year and the plane was being taxied out to be dumped off the end of the runway.

"Now I cite this long story because I think this is what happened to Henry Miller, in effect. I think that Mr. Miller was fighting a war. He came down out of the hills of Paris to fight the war of what he called the 'revolt against reason'" [p. 842, line 22, to p. 843, line 18].

The witness defines what is meant by the "revolt against reason":

> "This [revolt against reason] took place in the 20's and in the 30's. And this was to break out from all authority and to be able to say and do everything. This traces back to Freud, Marx, and to the American depression, to many themes that historically are present at this time.
>
> "But the problem was that when Mr. Miller ran down out of the hills, with all this anger against the world, unfortunately, the war had been won by many other very effective American authors, who had plowed this same ground before, who had revolted from reason earlier, who had written about Paris and all this expatriate life and this faded disillusionment with the world" [p. 843, line 19, to p. 844, line 4].

The witness explains how Miller resolves the unpleasant fact that great authors have already written about the same subject as Miller is attempting to portray:

> "Now it seems to me then, at this point, Mr. Miller faces the terrible problem of a writer who realizes that great people have written about the very same subject that he wants to write about. Now how is he going to top them?
>
> "Perhaps he would go as far as trying to top them by the surrealistic style of the book; but yet that had been done, too.
>
> "So, perhaps, he would even go as far then as trying to totally bathe in what I consider personally, at heart, obscenity."

Author Carney analyzes Miller's irresponsible use of the "four letter" word:

> "Now it seems to me that when you study these three or four limits here, in the first place, Anglo-Saxon words have always been a part of our language and they have appeared in books. Certainly there was no more violent time of the usage of these words than, for instance, in the Civil War, where most of the population was uneducated. And yet we don't find these words in Whitman, who chronicled that time. We don't find them in really any of the great works of that era" [p. 844, line 20, to p. 845, line 2].

Miller's unique use of the "four letter" word as narrative description, rather than dialogue is cause for the following commentary:

> "Now where Mr. Miller further uses these words in a way that I consider irresponsible—these words occur often in the dialogue of people, in profanity, or in anger of some form or other—but Mr. Miller uses these words in the subjective narrative of the book. He writes—in his own thoughts these words appear. Now this removes it slightly from strictly being accurate and realistic in dialogue" [p. 845, lines 3-24].

Author Carney negates the fact that *Tropic of Cancer* has "redeeming social importance":

> "Now I think that secondly, when we talk about: Does the book have any social importance? The book does not have a meaning nor does it promise any rehabilitation for, we will say, the prostitute of Paris or this sort of life. It makes no social plea. And it gives no hope" [p. 845, lines 3-10].

On the lack of educational value to the student:

"Now when we go to the third point, which is basically: Does the book have any value to the student? Does it have any educational merit?

"It seems to me again that what Mr. Miller has done in the book has been better done in terms of writing by many other people; and beyond that, if we are dealing with the sexual act itself, I dare say Kinsey or any of the manuals on sexual habits, Krafft-Ebing, any of these could be far better guidebooks for the student" [p. 845, lines 10-24].

The witness compares *Tropic of Cancer* to other books which have "redeeming social importance":

"I don't think that the comparison of this book [Tropic of Cancer] to [Upton Sinclair's] *The Jungle* is at all valid [as testified to by defense witnesses]. As I said, I don't believe this book [Tropic of Cancer] has social importance.

"The *Jungle* dealt with the slaughtering of animals and it became the forerunner, I am told, of the Pure Food and Drug laws. This affected literally millions of people.

"Other books of social importance, like Sinclair Lewis' *Main Street*, for instance, where he was fighting against the narrow mores of Main Street, it again affected a tremendous segment. But Mr. Miller is really referring only to a tiny portion of expatriate people, who have lost their way, and are living in this Paris world in a sort of dream world.

"Therefore, the other books promise—they say, 'Here is a problem. Now, Society, you must solve this problem.'

"But Mr. Miller states no problem that I clearly can see, except that he tries to reduce man to the level of a total animal. That becomes man's problem, that he has no dignity at all, if we are to believe Mr. Miller, and I don't believe that, so I think it, therefore, it has no social importance" [p. 848, line 10, to p. 849, line 6].

Mrs. Edith Stafford

[Rep. Tr. Vol. 4, pp. 668-711]

Past President, Los Angeles City Board of Education [p. 670, lines 19-20] and a member of the Board for six years [p. 670, lines 15-16].

At present, lecturer to women's clubs, PTA's, and parent groups throughout California [p. 668, lines 21-23].

Bachelor of Arts degree, Pomona College [p. 668, line 26]. Resident of Los Angeles for 36 years [p. 668, line 18].

Mrs. Stafford testified the book *Tropic of Cancer* is "utterly without redeeming social importance" and is obscene as this term is defined by Penal Code Section 311(a) [p. 674, line 4, to p. 676, line 18].

Comments Mrs. Stafford on the lack of "redeeming social importance of Tropic of Cancer":

"My opinion is that it does not have any redeeming social importance. It is a filthy, dirty, obscene, objectionable book and has no redeeming feature, in my estimation" [p. 676, lines 9-12].

Mrs. Stafford inveighs against the irresponsible use of language and sex in *Tropic of Cancer:*

> "The language is so filthy and so objectionable that it is an offense to every standard in our society. It is an offense to marriage, to religion, to the family, to every man and woman of decency. The book is filled with this obsession with sex, including adultery and sodomy. Certainly something which society should protect itself against" [p. 677, lines 18-25].

Dr. C. C. Trillingham

[Rep. Tr. Vol. 4, pp. 626-667]

Los Angeles County Superintendent of Schools since 1942 [p. 626, line 25; p. 627, lines 1-8]. Dr. Trillingham has jurisdiction over 1500 schools which comprise Los Angeles County, including all public schools from elementary through junior college [p. 627, lines 9-17], encompassing an enrollment of 1,500,000 pupils [p. 628, lines 11-12].

Dr. Trillingham received his Bachelor of Arts, Master of Arts and Doctor of Philosophy degrees from the University of Southern California [p. 628, line 23, to p. 629, line 4].

Past President of the American Association of School Administrators for the year 1958, a nation-wide organization comprising 13,000 educators [p. 630, lines 18-26].

Past President of the Los Angeles Lions Club [p. 629, lines 5-10]; member of the Board of Trustees of Whittier College for 17 years [p. 630, lines 4-5]; member of the Board of Trustees, Los Angeles College of Osteopathic Physicians and Surgeons [p. 630, lines 6-

7]; member for the past 17 years of the State of California Curriculum Commission.

Dr. Trillingham testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Section 311(a), Penal Code [p. 633, lines 1-19].

Stated Dr. Trillingham:

> "The book seems to deal with the preoccupation of sex and filth that I think is below the standard of the average citizen . . ." [p. 633, lines 21-23].

Dr. Ellis A. Jarvis

[Rep. Tr. Vol. 5, pp. 818-849]

Retired Superintendent of Schools for the Los Angeles City School District [p. 818, lines 23-25]. As Superintendent for the Los Angeles City Schools, Dr. Jarvis had 575 schools under his direct supervision from kindergarten through junior college, encompassing 675,000 pupils [p. 819, lines 9-16].

Bachelor of Arts degree from the University of California at Berkeley; Master of Science degree from the University of Southern California. Honorary Doctorate degree from the Los Angeles College of Osteopathic Physicians and Surgeons [p. 819, lines 19-23; p. 822, lines 1-2].

Dr. Jarvis testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 822, line 21, to p. 823, line 19].

Stated Dr. Jarvis concerning the prurient appeal of *Tropic of Cancer:*

> "It seems to me the main burden of the book is almost total concern and description of functions of reproduction and excretion and the use and misuse thereof, the perversion thereof and so on . . ." [p. 823, lines 20-25].

Marie Louise Kearns

[Rep. Tr. Vol. 10, pp. 778-830]

Author, lecturer, book reviewer, and teacher of creative writing [p. 779, lines 17-18], using the pen-name of Marie Metlova and Louise Hathaway [p. 779, lines 21-22].

Author of three published novels: *No Stranger to My Heart,* which was reviewed by the New York Times and other national reviews; *Black Bread and Caviar,* under the pen-name Maria Metlova, and the *Enchanted Hour* [p. 780, lines 7-16].

Mrs. Kearns testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as the term is defined by Section 311(a) of the Penal Code [p. 783, lines 15-16; p. 784, lines 1-25].

Commenting as an author on Miller's misuse of sex in *Tropic of Cancer:*

> ". . . As an author, I would say that the writer—or as a person, the writer equates sex with vomit, bowel movements, toilet intercourse; and that if every writer were to follow this procedure, it would set the world of romance back to the caveman days." [p. 784, lines 3-7].

Continues the witness by analogizing to the beauty of the naked form:

> "There is beauty, for instance, in a very beautiful naked body. But let us say that some naked person were to walk in public and suddenly go to the bathroom. Where is the beauty? The beauty is obscured by the act. . . . What he does here, he takes an incident and he inserts just enough in that incident to lead him into an overwhelming portion of lurid sex and perversion. It isn't even good writing in this standpoint because it doesn't point out anything except a monotonous picture of degredation." [p. 785, lines 7-25; p. 786, lines 1-4].

Mrs. Kearns likens Miller's over-use of sex to the overseasoning of food:

> "I could liken it to—I will use another analogy. If I were cooking a very delicious dish and I wanted to season it, if I put nothing but seasoning in that dish, it wouldn't be fit to eat. It wouldn't be worth anything. And this is what he has done. Whatever little bit of beauty—and I am not denying that there are portions, but whatever he has done he has overwhelmed them.
>
> "I felt, when I had finished this book, that I had walked through fields of dung just to pick a flower here and a flower there." [p. 786, lines 5-15].

Mrs. Kearns criticizes Miller's misuse of language and his obsession with sex:

> "I don't believe that he has used language to the fullest. The language, to be powerful, must

impress to the finest sense and promote the subject that he is trying to bring forth.

"If the subject is consistently and repetitiously sex in its various forms, I do not call it power. He uses the same words over and over and over again with such repetition that it becomes sickening. . . .

"It's an obsession on one point. It's just like an artist would become obsessed and he would have a picture, he is trying to portray a countryside, but all he is putting in that one picture, just one thing, rocks, rocks, rocks, rocks. You can't see the sky; you can't see the trees. They are there, but you can't see them." [p. 788, lines 1-17].

Father Clarence E. Crowther

[Rep. Tr. Vol. 10, pp. 584-603]

Senior Episcopal Chaplain, University of California at Los Angeles [p. 584, lines 24-26].

Bachelor of Arts degree, University of Leeds, England; Bachelor of Laws and Master of Laws, University of Leeds. Past professor of criminal and constitutional law, Oxford University [p. 585, line 23, to p. 586, line 7].

Graduate of Oxford Seminary, Oxford, England; ordained to the ministry of the Church of England in 1956 [p. 586, lines 11-13].

Father Crowther testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 588, line 8, to p. 589, line 9].

Commenting on the lack of "redeeming social importance" in *Tropic of Cancer,* Father Crowther states:

> "I think the phrase 'redeeming social importance' would be ludicrous as applied to this book [Tropic of Cancer]. I do not think it has any." [p. 589, lines 4-6].

Referring to Miller's purpose in writing *Tropic of Cancer,* says Father Crowther:

> "As I remember it, on page 2, I think, of the book, he describes what I interpret to be his purpose in writing the book and I find it very difficult, with this motivation, the author seeks to offer a service to a society which he so obviously despises.
>
> "And I think that the language used constantly in the book to get across the purpose which he describes here most certainly, in my experience, goes far and away beyond that which is normally accepted to be customary standards of expression." [p. 589, lines 18-26].

Father Crowther states the impression *Tropic of Cancer* made upon him:

> "The book as a whole gave me the impression, in the few pages where I did not think that it was obscene, of a rather pleasant walk down a country lane; but the snag is that every stopping point was a brothel. And I couldn't see what on earth the man was trying to get at, other than in the light of what he says here—and I hope I am privileged in this court—to simply spew out upon the face of society the excretion of the sickest mind that I think I ever heard of. I think that the method of

the treatment of women is degrading; it is humiliating; it is sordid and utterly without merit or certainly without redemption, as I understand the word." [p. 580, lines 1-12].

On Miller's demeaning of sex:

"I think that his treatment of sex, which to me is a thing of great beauty and sacramental significance, his treatment of sex is a constant and wild orgy which, I think, demeans a beautiful thing." [p. 590, lines 13-16].

On Miller's treatment of society:

"I think that his treatment of society as a whole does not in any way offer solutions to what we all know to be the problems of society; but overall it is the method of treatment which I found sickeningly repulsive, and if this book were a book written for psychiatrists in order to examine a sick mind, then I think it would be one of the most important books every written. But I don't think that that was the purpose of the commercial production of this book.

"If it could be confined to people who were to examine diseases of the mind scientifically then, perhaps it may be significant. But certainly not, I think, in the general accepted intention of its publication." [p. 590, line 17, to p. 591, line 3].

In refuting a comparison made by defense experts [Rev. Paul Sawyer, Unitarian Minister, Dr. Jack Hirshman, Assistant Professor of English, U.C.L.A.] of Miller's affinity to Jesus Christ, Father Crowther states:

"No, I don't think that he can be compared with Christ and I would find it very difficult,

indeed, to swear on oath before this court on the *Tropic of Cancer* as I would upon the book which describes the life of Christ." [p. 594, line 24, to p. 595, line 1].

Dr. Warren S. Jones

[Rep. Tr. Vol. 10, pp. 702-778]

Chairman of the Department of Speech and Dramatic Arts at Pepperdine College, Los Angeles [p. 703, lines 12-14]. Pepperdine College has an enrollment of approximately 1450 students [p. 707, line 14].

Dr. Jones teaches at the present time courses in rhetorical criticism (which includes the evaluation of written as well as oral discourse), advanced oral interpretation, and basic speech. Dr. Jones is presently directing four Master's degrees [p. 703, lines 24-26].

Dr. Jones received his Bachelor of Arts degree from David Lipscomb College, Nashville, Tennessee; Master's degree and Doctor of Philosophy degree from Wayne University [p. 704, lines 8-25].

Dr. Jones is an active speaker for various social clubs in the community, including Kiwanis, Rotary, Women's Club of Los Angeles, and the Lions Club [p. 705, lines 16-18].

Dr. Jones is a reserve Deputy Sheriff for the County of Los Angeles, but has no connection with the Los Angeles Police Department [p. 706, lines 2-3; p. 707, lines 4-6].

Dr. Jones testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 708, line 4, to p. 709, line 6].

Dr. Jones explains his reaction to reading *Tropic of Cancer:*

> "From the first page through the first time that I quit reading, which was 10 or 12 pages, I ran into nothing but sexual atrocities and what I would call 'animalism.' I had a lot of difficulty continuing to read because it did not hold my attention because of its sexual abnormalities and again the word 'animalism.' " [p. 711, line 25, to p. 712, line 4].

In reply to defense testimony [Assistant Professor of English, Henry Coulette, Los Angeles State College] that *Tropic of Cancer* will give an accurate view of 20th Century life to future generations, much like Shakespeare's view of 16th Century London:

> "I should hate to think that any future generation will evaluate our values by *Tropic of Cancer.* If we have become this degraded, I am ashamed of society" [p. 713, lines 16-18].

Thomas A. Devine

[Rep. Tr. Vol. 10, pp. 604-641]

Professor of Sociology, Pierce College, Los Angeles [p. 604, lines 18-20]. Pierce College has an enrollment of approximately 9,000 students [p. 605, line 3].

Professor Devine received his Bachelor and Master's degrees from Gonzaga University, Spokane, Washington [p. 606, lines 12-15].

Professor Devine testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 606, line 19, to p. 607, line 26].

Commented Professor Devine on the total lack of "redeeming social importance" of *Tropic of Cancer*.

> ". . . I think, according to this standard, the book would definitely be obscene. And what's more, I might add that I happened to take a notebook when I went through it, on the 5th point ['and is utterly without redeeming social importance'], to see if I could find anything of social importance. And I ended up without making a single note under that heading" [p. 707, lines 2-7].

And further:

> "I would say it has no redeeming importance because I would say that if it helped a person to find any self, it would be a self not worth finding, a degenerate, degraded self that it would help a person become, and that it does not depict sex as it exists but only as it exists in an extremely small, degraded segment, of which this man apparently sought out and lived with" [p. 609, lines 7-13].

Noting Miller's almost total preoccupation with sex, Professor Devine remarked:

> "It seems that this man [Miller] goes through his days almost with blinders on. He doesn't seem to see anything but these things. We can imagine some people walking down a street and looking at the birds or the trees but this man mainly seems to listen to toilets flushing or manure smeared all over everything. Then these passages have been mentioned before dealing with sex and sex perversion in a very degraded, unhealthy, immoral, I would say, close to degenerate approach all the way through the thing" [p. 608, lines 3-11].

Mrs. Elizabeth Lewis

[Rep. Tr. Vol. 5, pp. 850-859]

Past Chairman and present member of the Board of Trustees, California Women's Prisons [p. 851, lines 4-15].

Mrs. Lewis received her Master's degree from the University of Edinburgh, Scotland [p. 851, line 23, to p. 852, line 2], and has resided in Los Angeles for 36 years [p. 851, line 1].

Past President of the Los Angeles Tenth District P.T.A. from 1952 to 1954, which included the entire Los Angeles City School District [p. 852, lines 18-26].

Past President of the Federation of Community Co-ordinating Councils from 1946 to 1949. This is an organization made up of 100 local community councils whose functions are to deal with all types of problems arising in the community [p. 853, lines 7-24].

Past President of the Los Angeles YWCA for 3 years [p. 854, lines 6-8].

Past member for 6 years of the Citizens Advisory Committee to the Attorney General on Crime Prevention [p. 855, lines 4-10].

Mrs. Lewis testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 855, line 22, to p. 856, line 11].

Mrs. Lewis describes her revulsion of the morbidness of Miller's treatment of sex:

> "I found when I did read the book I was revolted in the extreme. I found there was very definitely an interest which seemed to me morbid

in the physiological descriptions of the sexual act and of excretion, and described in such terms—Well, the only thing I can think of is that the author seemed to me to be just wallowing in barnyard filth and using barnyard terms to describe grossly physiological acts" [p. 856, line 26, to p. 857, line 7].

Rabbi Ernst R. Trattner

[Rep. Tr. Vol. 9, pp. 449-581]

Rabbi of Westwood Temple [p. 500, line 20]. Westwood Temple has a congregation comprising 700 Jewish families. Rabbi Trattner has resided in Los Angeles for 40 years [p. 500, line 23].

Rabbi Trattner received his Bacherlor of Arts degree from the University of Southern California, a Master's degree from Columbia University, and Honorary Doctorate degrees from Andhra University, Jaipur, India, the University of Bari, Italy, and the Institute of Religious Science and School of Philosophy of Los Angeles [p. 501, line 1, to p. 502, line 4; p. 566, lines 5-19].

Rabbi Trattner is the author of five published books: *Unraveling the Book of Books, The Autobiography of God, As a Jew Sees Jesus, The Architect of Ideas,* and *Understanding the Talmud* [p. 503, lines 1-21].

Rabbi Trattner served as religious consultant to the late C. B. De Mille for the motion picture "The King of Kings" [p. 503, line 21] and served as Past President of the Los Angeles Chapter of the American Jewish Congress [p. 503, lines 24-26].

Rabbi Trattner testified *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as

this term is defined by Penal Code Section 311(a) [p. 505, line 23, to p. 507, line 9].

The Rabbi defines the word "redeeming" and notes the complete absence of any redemptive qualities in *Tropic of Cancer*:

> "The word redeeming implies redemption, and redemption means that you are moving from a bad situation to a better situation. I do not see where the writing of Mr. Miller helps the individual reader to move from a bad situation to a better situation" [p. 507, lines 1-5].

Commenting on Miller's defilement of all spiritual and physical life, and his lack of ability to leave the average person with any emerging social value:

> "Mr. Miller's whole outlook upon life is one of defilement, defilement of every physical and spiritual motivation. I could not find within the writing of that book one ennobling sentence or paragraph that would enable one to feel that this is material that could be of help to any human being. On the contrary, I found sentences very derogatory to everything that I stand for in life. I found it deeply offensive; I found it wallowing in putrification. . . . I thought, as I finished the book, 'What would happen to its sales if every defiling word or sentence were to be removed? What would then be left?' The answer is, 'Nothing of any value to the reader'" [p. 507, line 13, to p. 508, line 3].

Dr. Joseph Paul De River

[Rep. Tr. Vol. 11, pp. 877-891]

Psychiatrist and Physician and Surgeon [p. 877, line 24].

Dr. De River took pre-medical training at the University of Alabama and his Doctor of Medicine degree at Tulane University; Dr. De River interned at Allegheny General Hospital and St. Joseph's Hospital in Reading, Pennsylvania, with specialties in brain surgery, and nervous and mental diseases [p. 879, lines 4-11; p. 891, lines 25-26].

Dr. De River is a Fellow of the American College of Surgeons [p. 880, lines 8-11]; is employed in an advisory capacity to the Los Angeles Municipal and Superior Courts [p. 878, line 20] and has served as a Medical-Legal member of the Adjudication Board of the Sawtelle Veterans Hospital [p. 883, lines 5-7].

From 1937 to 1950, Dr. De River served as Psychiatrist for the Los Angeles Police Department, as well as a consultant to the Arson Bureau, Los Angeles Fire Department [p. 883, lines 10-13].

Dr. De River is author of the published books, *The Sexual Criminal* and *Crime and the Sexual Psychopath.*

Dr. De River testified that *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 884, line 19, to p. 885, line 17].

Commenting on the author's purpose in writing *Tropic of Cancer*:

> "He [Miller] is describing sexual pictures here, the interest in the various and anatomical parts of the female, interested in close-ups of excretions,

the interest in odors, the odor fetishes that are brought out in this book, the interest in the way he works himself up into a sexual frenzy, apparently by a crescendo, a buildup; one filthy four-letter word after another, built up one after another" [p. 888, line 24, to p. 889, line 8].

Dr. De River feels that *Tropic of Cancer* belongs in the "case history" file of the psychiatrist:

> "In my opinion, that [Tropic of Cancer] belongs in the psychiatric files of some psychiatrist that's handling the case" [p. 911, lines 21-22].

And further:

> "I think that it should be in the files of some psychiatrist who keeps a case history of those kinds of things—that's the only place for it—dealing with sexual perversions" [p. 912, lines 15-18].

Dr. Marcus Crahan

[Rep. Tr. Vol. 10, pp. 642-687]

Psychiatrist and Physician and Surgeon [p. 643, line 10].

Medical Director of the Correctional Facilities of Los Angeles County, with 8,000 inmates under his direct supervision and control [p. 643, lines 11-15; p. 648, lines 1-2].

Dr. Crahan is presently a member of the Los Angeles Superior Court panel of psychiatric experts and is also a member of the Department of Mental Hygiene for Los Angeles County [p. 643, lines 16-18].

Dr. Crahan has conducted psychiatric examinations, by court appointment, for between 5,000 and 19,000 individuals [p. 644, lines 7-9].

Dr. Crahan received his Bachelor of Arts and Doctor of Medicine degrees from Syracuse University. He has resided in Los Angeles since 1925 [p. 643, line 4, p. 644, lines 10-25].

Dr. Crahan is currently a professor at the University of Southern California School of Medicine, and on the staff of St. Vincent's and Los Angeles County Hospitals [p. 645, lines 1-7].

Dr. Crahan has conducted psychiatric and medical research at U.C.L.A., California Institute of Technology, Johns Hopkins University and U.S.C.

Dr. Crahan has served as Past Chairman of the Church and Community Committee of Los Angeles, which committee is comprised of all the major churches, leading educators, citizens, public officials, and members of the judiciary, whose function is to deal with the problem of sexual deviancy in Los Angeles [p. 645, lines 13-23].

An avid book collector, Dr. Crahan is a regular supporter of such libraries as Princeton, Syracuse, Claremont, Occidental, California at Berkeley, the Southwest and Los Angeles County Museums [p. 646, lines 21-24].

As a collector of books, Dr. Crahan is a member of such book collectors' clubs as Grolier's of New York, the Roxboro of San Francisco, and the Zamarano of Los Angeles. He has served as Past President of the Zamarano Club of Los Angeles [p. 646, line 25, to p. 647, line 3].

Dr. Crahan's personal library consists of between three and four thousand volumes of books [p. 647, lines 16-17].

Dr. Crahan's opinion is that *Tropic of Cancer* is "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 648, line 9, to p. 649, line 22].

Dr. Crahan, in describing why he feels *Tropic of Cancer* is obscene, states where he believes Miller received his main source of inspiration to write the book:

> "I believe it [Tropic of Cancer] is obscene because the writer, who has an excellent vocabulary, preferred to use vulgar vernacular and descriptions that are not used in print or in public in good society.
>
> "This is an autobiography, a Freudian couch catharsis, in which the writer exposes his weaknesses and his personal interest, his rectal vanity and uses his genitals as his main source of inspiration." [p. 649, line 24, to p. 650, line 4].

Continues Dr. Crahan:

> "He uses his penial organ as a scriber's tool and he uses excretions as his ink." [p. 650, lines 5-6].

Dr. Crahan believes *Tropic of Cancer* is not fit for sale to the public, but is a case history of a sick mind:

> "I believe this book is for cannibals and animals and not for human distribution. I believe it is not a social study.
>
> "I believe, rather than this, that it is a case history of a sick man. This man further goes be-

yond acceptable practices by stating that he is inhuman, that he does not belong to man or governments, does not believe in creeds or principles. This man writes deliberately and defiantly an insulting thing, a slap in the face to the average American, because he dislikes America; he is spitting in Uncle Sam's face in this work" [p. 650, lines 7-17].

Dr. Crahan stresses the lack of redeeming social value of *Tropic of Cancer:*

"I can see nothing about it that is redeeming. This book, however, should not be burned or destroyed. I don't believe in this. The book should be kept for research and locked up as any case history should be" [p. 650, lines 18-21].

The lack of humor in *Tropic of Cancer:*

"There is no humor in this book. This is a sadistic work" [p. 651, lines 18-19]:

The misuse by Miller of the "four-letter" word:

"The average use of the four-letter words in America or in this community are words to express annoyances; they are expletives and have not any direct meaning, whereas, this writer describes these matters and substances and offensive things as literate things, as they are" [p. 652, lines 1-6].

Dr. Crahan comments that one may be prompted to experiment in these deviant sex practices:

"I believe that the average person who picks up the book from the standpoint of curiosity may be excited to experiment curiously in some of these deviant practices that the writer advocates" [p. 651, lines 10-13].

In answering defense testimony [Dr. Otto Ficke, Assistant Professor of English, Los Angeles State College] that Miller depicts the sex life as it exists in the private world of the average person in the community:

> "This is not true. According to any research that I know about or according to my own case files, this is not an average experience of the average person" [p. 652, lines 7-25].

Leon Uris

[Rep. Tr. Vol. 11, pp. 1088-1106]

Professional writer [p. 1088, line 24].

Author of such internationally famous novels as *Exodus, Battle Cry, The Angry Hills,* and the current best-seller *Mila 18* [p. 1089, lines 15-26; p. 1091, lines 20-21].

Wrote the screen play for the motion pictures "Battle Cry" and "Gun Fight at OK Corral" [p. 1091, lines 4-5].

Mr. Uris testified *Tropic of Cancer* was "utterly without redeeming social importance" and obscene as this term is defined by Penal Code Section 311(a) [p. 1098, line 11, to p. 1099, line 2].

In stating why *Tropic of Cancer* is obscene, Mr. Uris premises his conclusion on the principle that the writer owes a definite responsibility to the community:

> "Well, first of all, I don't think this man is a writer, and I don't think this is a book. I think it is the ramblings of a pervert and it's not that—you know, it seems like morality is a dirty word around here. But we have codes that we live by. They were started in Mount Sinai. And we have

traditions of ethics and I believe a writer like every other human being, has a responsibility. He has a duty to the people he is writing for and to himself" [p. 1099, lines 4-12].

Mr. Uris characterizes *Tropic of Cancer* as neither a book nor the work of a sane man:

"I don't believe, as I say, this is either a novel or a book. I don't think it is the work of a sane man. And I think he goes beyond every bound of morality that I have ever known in my life, everything that I have been taught.

"And I am not ashamed to say that I believe I have morals" [p. 1099, lines 13-19].

Replying to defense testimony that *Tropic of Cancer* will lead to a more frank, less inhibited sex life for the average person in the community [Dr. Blake Nevius, Chairman of the English Department, U.C.L.A.]:

"Well, I think that the sexual descriptions are perverted for a good part. I don't think these are the sexual activities carried on by normal people" [p. 1104, lines 6-8].

Mr. Uris candidly describes the duty of the community when faced with such a book as *Tropic of Cancer:*

"I believe we have a right to defend ourselves against this type of garbage, the same way we would any other ordinary criminal or any pervert walking the streets of Los Angeles. I think we have a community duty to defend ourselves against this type of thing" [p. 1100, lines 21-25].